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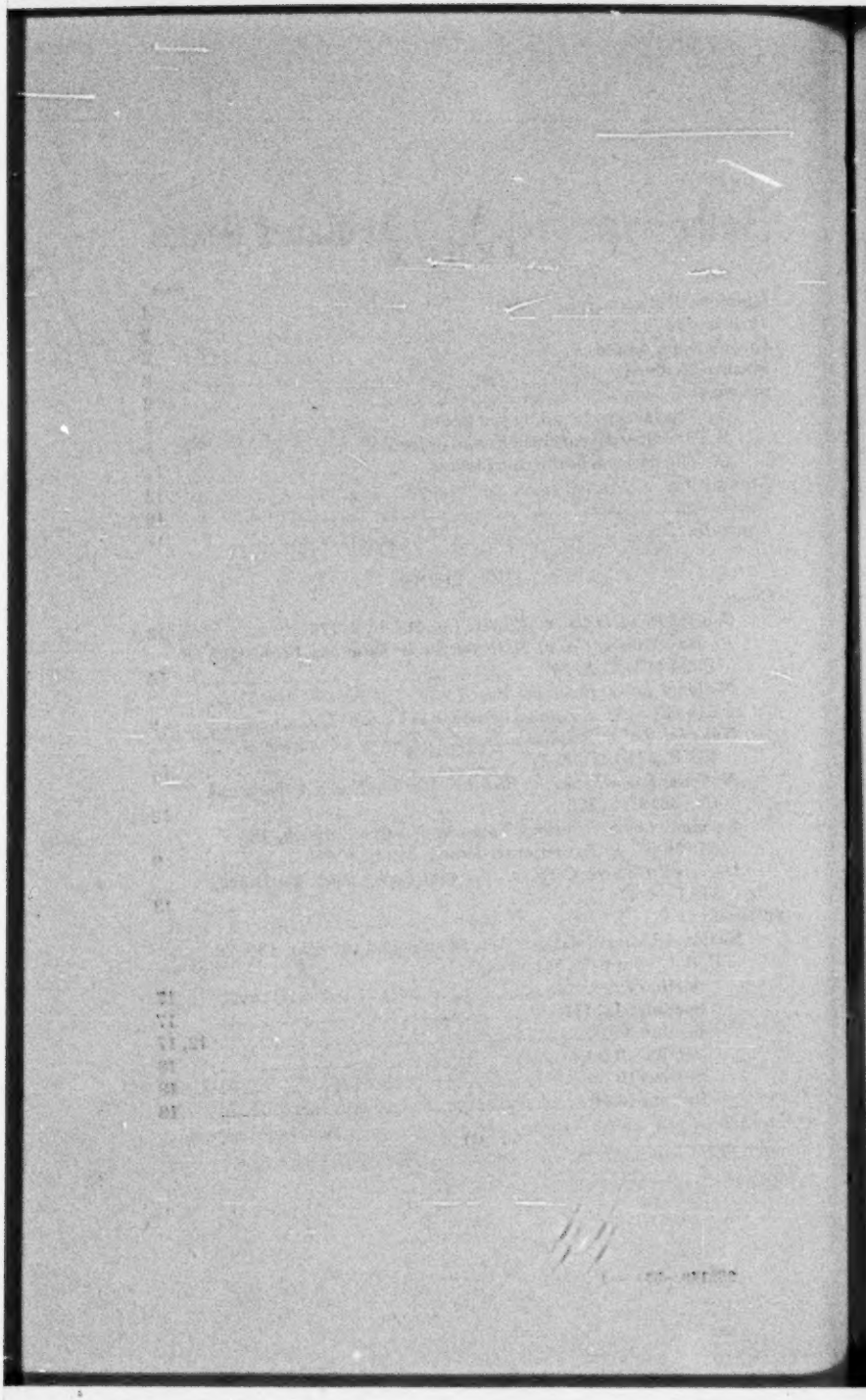

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 107

UNITED STATES COLD STORAGE CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 122–132)[1] is reported at 203 F. 2d 924. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 77–90) are reported at 96 NLRB 1108.

[1] The symbol "R." refers to the transcript of record; the symbol "B. A." refers to the appendix to the brief filed by the Board in the court below. Both of the foregoing, together with the appendix to the Company's brief in the court below, constitute the record before this Court.

JURISDICTION

The decree of the court below was entered on May 19, 1953 (R. 133–137). The petition for a writ of certiorari was filed on June 6, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Following an impasse in collective bargaining negotiations, a strike was called at petitioner's plant. After the strike had been in progress for three months, the representative of petitioner's employees submitted a proposed contract which contained a concession on one of the few major issues which had led to the impasse. The first question presented is whether, considering these circumstances, there is substantial evidence on the record as a whole to support the Board's finding that petitioner's refusal, because of the pre-strike impasse, to meet with its employees' representative to discuss the proposed contract violated Section 8 (a) (5) of the Act.

2. Whether substantial evidence on the record considered as a whole supports the Board's finding that petitioner discharged its striking employees because of their refusal to abandon a lawful strike and return to work, thereby violating Section 8 (a) (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 17–19.

STATEMENT

This case involves Board findings that petitioner committed unfair labor practices within the meaning of the Act (1) in discharging strikers because of their refusal to abandon a lawful strike and return to work; and (2) in refusing, during the course of a strike, to meet with the representative of its employees and bargain collectively concerning a new contract.

Petitioner challenges the propriety of these findings. The relevant facts may be summarized as follows:

A. The facts as found by the Board

On December 4, 1949, following an election held on November 10, 1949, the Board certified Stationary Engineers, Local 707, International Union of Operating Engineers, AFL, herein called the Union, as the exclusive bargaining representative of petitioner's employees in the engineering department of its Dallas, Texas, plant (R. 96, 97; B. A. 29–39).[2] During the next few months petitioner and the Union engaged in

[2] References preceding a semicolon are to Board findings; succeeding references are to the supporting evidence.

bargaining negotiations and reached agreement on all issues except wages and seniority (R. 97–111; B. A. 14–23, 27). These two matters being unresolved, the Union on April 5, 1950, called a strike of the engineering department employees and established a picket line at the plant (R. 112; B. A. 5, 6, 13).

On the second day of the strike, April 6, petitioner sent the following telegram to each of the seven striking employees (R. 112; B. A. 5–8, 39):

> We consider the strike illegal since at no time did the company refuse to bargain. Under the circumstances we would like you to report back to your regular job within 24 hours after receiving this telegram on your regular shift time. If you do not report, we will consider that you are terminating your employment and a replacement will be hired.

The strikers did not return to work, and petitioner, pursuant to the terms of the telegram, terminated their employment on April 7 (R. 81–83; B. A. 7–9, 11, 12).[3] Having thus discharged

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[3] R. P. MacKenzie, petitioner's vice president and manager, who sent the telegrams, testified as follows (R. 81, 82; B. A. 4, 8–9, 12):

"Q. * * * Then, are we to understand that at the termination of twenty-four hours after the receipt of the telegram by the seven employees, and if they did not report to work, their employment would be terminated as of that time?

"A. I consider that they would be terminating it; yes.

"Q. So we can say that their employment, then, was terminated approximately twenty-four hours after 6:30 p. m., April 6, 1950?

the strikers, petitioner thereafter began to hire new employees to fill the vacant jobs. The first such employee was hired on April 7, the second on April 11, and the third on April 12 (R. 114; B. A. 10, 11).[4]

On April 24, petitioner addressed a letter to each of the strikers which read in pertinent part as follows (R. 112, 113; B. A. 11, 12, 40, 41):

> On April 6, we notified you by telegram to return to work within 24 hours from the receipt of the message or *we would terminate the employment.* You did not return to work; and consequently *we consider you are no longer an employee of the Company.* [Emphasis supplied.][5]

"A. Correct.

"Trial Examiner Plost. Did you give these men any further notice after the telegram that their employment had been terminated by the company?

* * * * *

"The Witness. No, sir; we didn't. The telegram was worded, I thought that they would consider that they were terminating it if they didn't come back.

* * * * *

"Q. Now, Mr. MacKenzie, when the employees were discharged or their employment terminated by that telegram on April 6th, and their subsequent conduct, their employment was so terminated because of their refusal to work and abandon the strike they were on; is that not correct?

"A. I consider they terminated their own employment by not returning and running the plant for us."

[4] A fourth employee, Harnist, was hired on a purely temporary basis (B. A. 10, 23).

[5] In this letter petitioner gave each of the strikers an opportunity to convert the group insurance under which they had been covered to an individual policy (R. 112–113; B. A. 41).

On May 1, 1950, the Union wrote petitioner that it considered the termination of the employment of the strikers, as set forth in petitioner's telegram of April 6 and letter of April 24, to constitute discrimination within the meaning of Section 8 (a) (3) of the Act, and that it had filed an unfair labor practice charge with the Board alleging such unlawful discrimination (R. 83; B. A. 51, 52). In response to this letter, petitioner wrote to the Union, protesting that there had been no discrimination against the strikers and that they had not been discharged but had voluntarily terminated their employment (R. 82, 83; B. A. 53–55). Petitioner further stated that while it had secured replacements for some of the strikers, it could reemploy one operating engineer and two maintenance men, and that as far as "the other former employees" were concerned, they might make application for employment and would be reemployed when vacancies occurred (R. 8; B. A. 54, 55). On May 13, 1950, two of the strikers, William Driver and Claude Barksdale, applied for the available jobs and were reemployed (B. A. 5, 10). The others remained on strike and did not apply for reemployment.

While these events were taking place, the Union sought to resume bargaining negotiations. Approximately a month after the strike began, the Union wrote petitioner that "we stand ready to meet and bargain with you in good faith at any time" (R. 78, 79; B. A. 52). In its May 8

reply, petitioner stated that "If you desire to continue negotiations, if you will submit any proposition you have to make in writing, it will be considered by the Company at any time" (R. 82; B. A. 55). Accordingly, on May 20, 1950, the Union submitted a proposed contract and asked petitioner to meet with it for the purpose of negotiations (R. 78, n. 1; B. A. 55–62).

In this proposed contract, the Union made a substantial concession on the issue of wages, which had been a major stumbling block in the bargaining negotiations prior to the strike.* Nevertheless, petitioner again ignored the Union's request for a resumption of negotiations and, on June 1, 1950, wrote the Union that certain provisions of the proposed contract were unacceptable and that, if the Union would revise its contract in accordance with petitioner's views and resubmit it, petitioner would consider it (R. 78; B. A. 64–65).

Replying to this letter, the Union on June 2 again asked petitioner to meet personally with it for the purpose of negotiating a satisfactory agreement (R. 78, n. 1; B. A. 66). On June 19,

* During the pre-strike negotiations the Union had been asking for $1.50 per hour for operating engineers and $1.45 per hour for maintenance men trainees, while the best offer made by petitioner had been $1.15 for engineers and 80 cents to $1.00 for trainees (R. 102, 104; B. A. 20, 21, 24, 25, 27, 42–46). In the proposed contract of May 20, the Union reduced its demand to $1.35 for engineers and $1.05 to $1.25 for trainees (R. 102; B. A. 55–59).

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petitioner specifically refused to meet with the Union on the ground that in its opinion further negotiations would be futile since pre-strike efforts to bargain had resulted in an impasse on seniority and wages (R. 78–79; B. A. 67–68). Petitioner repeated its suggestion that the Union revise its proposed contract in accordance with petitioner's views and resubmit it for consideration (R. 79; B. A. 68). On June 20, the Union, for the fourth time since the beginning of the strike, asked for a bargaining conference, but petitioner this time ignored the request altogether (R. 78, n. 1, 79; B. A. 68, 69).

B. The Board's conclusions and order

Upon the foregoing facts the Board found, contrary to the Trial Examiner, that petitioner had violated Section 8 (a) (5) and (1) of the Act. While agreeing with the Trial Examiner that the bargaining obligation does not require parties to engage in futile bargaining in the face of a genuine impasse, the Board was of the view, under all the circumstances in the record, that the changed situation created by the strike broke the impasse, and that petitioner did not fulfill the bargaining obligation defined in Section 8 (d) of the Act "to meet at reasonable times and confer" with the Union (R. 78–79).

The Board also found that petitioner had discharged its employees for striking and thereby vio-

lated Section 8 (a) (1) of the Act.[7] In so holding, the Board reaffirmed the right of an employer to replace economic strikers, thereby terminating their employment. However, contrary to the Trial Examiner, the Board concluded that petitioner's April 6 telegram was not a mere statement of its right to replace strikers, but rather a notice of discharge, such discharge taking effect pursuant to the terms of the telegram, 24 hours after its receipt and before any of the strikers had been replaced (R. 79–83). The Board predicated this holding on all the facts in the record, including the interpretation placed on the April 6 telegram by petitioner's own officials (R. 81–83; n. 3, *supra*, pp. 4–5).

Accordingly, the Board ordered petitioner to cease and desist from its unfair labor practices, to bargain with the Union upon request, to reinstate and make whole the employees discriminated against, and to post the usual notices (R. 87–90).[8]

[7] The Board, recognizing that such conduct also violated Section 8 (a) (3) of the Act, refrained from so finding in the absence of a specific allegation to that effect in the complaint. The remedy of reinstatement and back pay is appropriate, however, on either theory. *National Labor Relations Board* v. *J. I. Case Co.*, 198 F. 2d 919, 924 (C. A. 8), certiorari denied, 345 U. S. 917; *National Labor Relations Board* v. *Nu-Car Carriers*, 189 F. 2d 756, 760 (C. A. 3), certiorari denied, 342 U. S. 919.

[8] The Board's order limits back pay to reimbursement for wage losses sustained by the discharged employees only "by reason of [petitioner's] discrimination against them" (R. 3). Accordingly, pursuant to the Board's customary practice in strike situations, petitioner will be required to make the

C. The decision of the court below

The court below, Chief Judge Hutcheson dissenting, approved the Board's findings and enforced the Board's order (R. 122–132). Analyzing the relevant evidence, the majority agreed with the Board that petitioner's April 6 telegram "did not constitute a mere statement of [petitioner's] right to replace economic strikers, but actually operated as a notice of discharge to be effective 24 hours after its receipt if they had not by then reported back to their regular jobs" (R. 126). Recognizing, as had the Board, petitioner's right to replace economic strikers and thereby terminate their employment, the majority noted the countervailing and uniform rule that discharge of such strikers prior to the time their jobs are filled, in reprisal for striking, constitutes an unfair labor practice (R. 126–127).

On the bargaining issue, the majority was in accord with the Board's view that, upon all the facts in the record, petitioner could not be deemed to have fulfilled its bargaining obligation (R. 127–129). Alluding specifically to the duty to bargain as defined in Section 8 (d) of the Act,

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employees whole not from the date of the discharges but only "from the date when they have indicated their desire to return to work * * * by abandoning the strike or otherwise" (R. 85). Similarly, in view of the Trial Examiner's prior dismissal of the portions of the complaint alleging discrimination, the Board's back pay order excludes liability for the period between the issuance of the Intermediate Report and its own Decision and Order (R. 86).

to the impact of a strike of almost three months' duration upon the willingness of the parties to compromise their differences, and to the fact that the Union's proposed contract of May 20 contained a substantial concession on the critical issue of wages, the majority concluded, like the Board, that the impasse which might otherwise have rendered any further bargaining futile was effectively broken so as to reactivate petitioner's obligation "to meet at reasonable times and confer in good faith" (R. 128–129). Accordingly, the majority ruled that petitioner's refusal to meet with the Union and negotiate further "was unreasonable under the changed circumstances then existing" and constituted a violation of Section 8 (a) (5) of the Act (R. 129).

The dissenting judge adopted the view espoused by petitioner and the Trial Examiner that the April 6 telegram constituted a mere restatement of petitioner's right to replace economic strikers, and that petitioner's refusal during the strike to meet and confer with the Union concerning its proposed contract of May 20 was proper in view of the prior impasse in bargaining negotiations and the surrounding circumstances (R. 129–131). The dissenting opinion also argued that petitioner's offer of May 8 to reinstate three strikers immediately and reemploy the rest when vacancies occurred, coupled with the failure of most of the strikers to request reinstatement, satisfied any

obligation of petitioner under the Act, and hence invalidated the Board's order (R. 131–132).

ARGUMENT

Petitioner asserts no appropriate basis for the grant of certiorari. The principles of law involved are well settled and undisputed here. The case involves only differences as to the proper factual inferences to be drawn from the record—differences which, in our view, were correctly resolved by the Board and the majority of the court below, but which present, in any event, no occasion for further review by this Court.

1. On the issue as to whether petitioner unlawfully refused to bargain collectively, the parties are agreed that where a genuine impasse exists, the Act does not require a continuation of futile bargaining negotiations. On the other hand, it is equally unchallenged that where circumstances demonstrate that the impasse no longer exists, the bargaining obligation defined by Section 8 (d) of the Act is again fully operative. The difference between the majority and the minority views in the court below, like the difference between the Board and the Trial Examiner, rests merely in the inferences drawn from the virtually undisputed facts. In their appraisal of the record, the court majority and the Board concluded, from the three-month-old strike and from the fact that the Union in its May 20 contract made a concession on one of the two major issues

previously dividing petitioner and the Union, that the conditions which had led to the impasse had changed, that the deadlock had been broken, and that petitioner was therefore under a duty again to meet with the Union and bargain (R. 78–79, 127–129). The dissenting judge (R. 131), like petitioner (Pet. 18–23), felt that this inference was unwarranted. At most, therefore, the sole matter in issue is whether the facts on the record support the Board's view, concurred in by the court majority. We submit that they do. And "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; see also *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, 491.*

2. The question concerning the discharge of the strikers is likewise not appropriate for review. The basic postulates laid down by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, that an employer may in order to continue his business replace economic strikers,

* There is no substance in petitioner's contention (Pet. 9, 11, 16, 18, 19, 20) that because the majority in the court below used the word "assumption" in describing the Board's holding that the impasse was broken (R. 131), that holding is therefore vulnerable as unsupported by the record. The court below used the word "assumption" in the sense of "finding," as is clear from the context of the opinion, and concluded that the finding in question was adequately supported by the record.

but that he may not discharge employees in reprisal for striking are acknowledged on both sides. The dissenting judge merely quarrels with the finding of the Board, approved by the majority of the court below, that the telegram of April 6 constituted a notice of discharge rather than a mere restatement of the law governing replacement of economic strikers. In view of the construction placed upon the telegram by its author, petitioner's vice-president and manager (*supra,* n. 3), plus petitioner's later allusion to the telegram in its letter of April 24 as resulting in a termination of employment (*supra,* p. 5), the finding that the telegram was a notice of discharge, taking effect 24 hours after its receipt, is plainly reasonable.

Kansas Milling Company v. *National Labor Relations Board,* 185 F. 2d 413 (C. A. 10), on which petitioner relies, is not in conflict with the instant case. While the language contained in the "back-to-work" letters involved there had a surface similarity to the words used here, there was in that case no showing, as there was here, that the language was intended to, and did, amount to a notice of discharge. Here, again, petitioner disputes nothing more than the correctness of a particular fact finding or inference reached by the Board and approved by the majority of the court below on the record considered as a whole.

3. Petitioner's question numbered (3) (Pet. 10, 25–26), relating to the propriety of a Board order directing reinstatement and back pay to strikers who have not requested reinstatement, is not presented. Inasmuch as the Board determined that the strikers in the instant case had been discharged, the question is not as to the reinstatement of strikers but as to the reinstatement of wrongfully discharged employees who are not required to make the futile gesture of applying for reinstatement.[10] *National Labor Relations Board* v. *Crosby Chemicals, Inc.*, 188 F. 2d 91 (C. A. 5), upon which the dissenting judge (R. 136, n. 2) and petitioner (Pet. 26) rely, has to do with the former situation. It should, perhaps, be noted that the Board here, as in all strike situations, carefully limited the relief granted to the period when it was clear that the strike had been abandoned or otherwise terminated (see *supra*, n. 8, pp. 9–10). But when this condition was met, the employees' right to reinstatement and back pay was complete without the formality of a demand that the employer remedy the unlawful discharges.

[10] By the same token, petitioner's offer of May 8, 1950, a month after the wrongful discharges, to reemploy three of the strikers, and the actual reemployment on May 13 of two of the strikers (*supra*, p. 6), in no way terminated its liability with regard to them. For these steps fall short, of course, of what wrongfully discharged employees are entitled to under the Act—namely, substantially equivalent positions without prejudice to their seniority or other rights and privileges.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

OSCAR H. DAVIS,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

ARNOLD ORDMAN,
Attorney,

National Labor Relations Board.

JULY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the

proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1959